Supreme Court, U.S.
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No. 94-94 465 SEP 13 1994

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

IRVING C. AND JEANETTE E. STEVENS,
Petitioners,

v.

PETER W. STOTT, L. John Harrington, James F. Wells, Kathryn E. Kendall, Josephine W. Hatfield, Walter T. Williamson, III, Judith A. Garling, William A. Jack and Evelyn J. Jack, as Trustees of the William A. Jack Family Trust, Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr., and Jocelyn U. Groom, as Trustee of the Separate property Trust of Jocelyn U. Groom,
Respondents.

On Writ of Certiorari To the
Oregon Court Of Appeals
Of The State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of whether a littoral state's appellate court can define the boundary between the state owned tideland and the privately owned uplands as being at the vegetation line rather than at the line of ordinary high tide, as this Court has consistently defined the boundary since 1842.

In the case below, plaintiffs, as owners of subdivision lots, platted in 1910, which overlooked the Pacific Ocean, brought a quiet title action, claiming the subdivision's west boundary ran to the tidelands, thereby extinguishing any title held by defendants under their deed to undeveloped land lying west of the subdivision and extending to the ocean's mean high tideline.[1] The factual question was whether the

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[1]Plaintiff also brought claims for nuisance and trespass, which were bifurcated for trial pending the outcome of the quiet title claim. Defendants' filed third-party claims against the State of Oregon and the City of Cannon Beach. They were also bifurcated pending the outcome of the quiet

dedicators of the subdivision intended its west boundary to extend to the Pacific Ocean or whether they reserved the intervening lands subsequently purchased by defendants. The trial court entered its judgment in favor of defendants below.

On *de novo* appeal the Oregon Court of Appeals, in attempting to devine the dedicator's intent held:

> ". . .The high-water line is significant because, in 1910, land- owners claiming under federal patents owned seaward only to the high-water line, which is assumed to be the vegetation line. In 1935, the Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. *State ex rel Thorton v. Hay,* 254 Or 584, 589, 462 P2d 671 (1969); *See Borax Ltd. v. Los Angeles,* 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935)." 127 Or App 440 (1994) at p. 443. App. A-4

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title claim. Following judgment for defendant in the quiet title action, the trial court entered judgments dismissing all pending claims, either on the motion of the plaintiffs or because they were moot. No appeal was taken from the dismissal judgment and the State of Oregon and City of Cannon Beach and were not parties to plaintiffs' appeal.

The Oregon Court of Appeals reversed the trial court and quieted title in plaintiff's favor. The Oregon Supreme Court declined to take discretionary review. In this context, the following questions are presented:

1. Did the lower court err by misinterpreting *Shively v. Bowlby*, 152 U.S. 1 (1894) as limiting the seaward boundary of federal patents to the upland's line of vegetation, thereby creating an impermissible cloud upon all federal patents of littoral uplands prior to 1935 when, according to the Oregon Court of Appeals, this Court moved the boundary seaward to the ordinary high tide line in *Borax v. Los Angeles*, 296 U.S. 10 (1935).

2. If so, does that erroneous holding, which limits the west boundary of all federal patents on the Oregon coast, prior to 1935, constitute an impermissible collateral attack upon those patents?

3. Does the retroactive decision below constitute a taking of petitioner's property and property of other similarly situated littoral upland owners without due process of law.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the trial court on the bifurcated issue of the quiet title action. Only the Petitioners and Respondents here participated in the plaintiffs' appeal to the Oregon Court of Appeals and Petition for Review to the Oregon Supreme Court.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iv

TABLE OF CONTENTS ..... v-vi

TABLE OF AUTHORITIES ..... vii-x

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

I. ONCE AGAIN, OREGON'S APPELLATE COURTS IGNORE BINDING SUPREME COURT PRECEDENT IN DEFINING THE LITTORAL BOUNDARY BETWEEN STATE OWNED TIDELANDS AND PRIVATE UPLANDS 8

II. THE DECISION BELOW, ESTABLISHING A NEW WESTERN BOUNDARY OF BEACHFRONT FEDERAL PATENTS IN OREGON, PRIOR TO 1935, CONSTITUTES AN IMPERMISSIBLE COLLATERAL ATTACK UPON SAID PATENTS AND SUCCEEDING TITLES 18

III. THE DECISION BELOW, BY AN IPSE DIXIT RETROACTIVE RULING OF LAW, CONTRADICTS, NOT ONLY THE CONTROLLING FEDERAL LAW, BUT ALSO SUDDENLY CONTRADICTS ONE HUNDRED SEVENTEEN YEARS OF COMMON LAW AND STATUTORY LAW OF REAL PROPERTY IN OREGON 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Page

Andrus v. Knott,
12 Or 501, 8 P 763 (1885) 20

Appleby v. New York,
271 U.S. 364, 380 (1926) 22

Barker v. Harvey,
181 U.S. 481 (1901) 16, 19

Borax Ltd. v. Los Angeles,
296 U.S. 10,56 S Ct
23, 80 L.Ed 9 (1935) ..... ii, 5, 6, 9, 10, 13-15, 24,

Bowlby v. Shively,
22 Or 410, 30 P 154 (1894) ..... 8, ftn 2, 11, 20

Hardin v. Jordan,
140 U.S. 371, 381 (1890) 9, 13

Hardy v. California Logan Powder Co.
109 Or 76, 219 P 197 (1923) 20

Hinman v. Warren
6 Or 408 (1877) 20

Hughes v. Washington,
389 U.S. 290 (1967) 19, 23

Knight v. United States Land Association
142 U.S. 161 (189) 10

Mann v. Tacoma Land Co.
153 U.S. 273, 283 (1894); 9

Martin v. Waddell,
41 U.S. 16 Pet. 369 (1842) 9, 10, 12

McGilvra v. Ross,
215 U.S. 70, 78-9 (1909) 9, 13

Oregon ex rel State Land Board v.
Corvallis Sand & Gravel Co.,
429 U.S. 363, 376 (1977) 10, 19

Packer v. Bird,
137 U.S. 661 (1891) 19

Phillips Petroleum v. Mississippi,
484 U.S. 469 (1988) 6, 9

Pollards' Lessee v. Hagan,
3 How 212 (1845) 10

Shively v. Bowlby,
152 U.S. 1 (1894) ..... iii, 6, 7, 8, ftn 2,
9, 10, 11, 12, 13, 18, 24

State ex rel Thornton et al v. Hay, et al
254 Or 584, 462 P2d 671 (1969) ..... 7, 8, ftn 2,
11, 13, 15, 16

Stevens v. City of Cannon Beach,
114 Or App 457 835 P2d 940 (1992)
317 Or 131 854 P2d 449 (1993)
cert. den. ___ U.S. ___ 114
S Ct 1332, 127 L.Ed2d 679 . . . . . 8, ftn 2, 12, 16

Taylor Sands Fishing Co. v. Benson,
56 Or 157, 108 P 126 (1920) 20

United States v. Pacheco,
69 U.S. 2 Wall. 587,590 (1842) 9, 10, 12, 13

United States v. Title Insurance & Trust Co.
265 U.S. 742 (1924) 16, 19

Ward v. Love County,
253 U.S. 17, 22 (1920) 22

Winston Bros. Co. v. State Tax Commission,
156 OR 505, 62 P2d 7 (1937) 21

Statutes and Court Rules

28 USC Section 1257(a) 2

1859 Act of Congress
11 Stat 383, (1859) . . . . . 2, App. D 2-3

1859 Act of First Oregon Legislature . . . . 3, App. D 3-6

1907 Ore. Laws Ch. 117 . . . . . 21, App. E 1-2

1930 Ore. Code § 60-301 ..... 21, App. E 2-3

OCLA § 106-301 ..... 21, App. E 4-5

Ore. Revised Statutes 274.005(8) ..... 21, App. E 5-6

1899 Ore. Laws 3 ..... 21, App. E 6

1913 Ore. Laws 80 ..... 21, App. E 7

U.S. Supreme Court Rule 10.1(c) 6

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PETITION FOR WRIT OF CERTIORARI

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Petitioner, Irving C. and Jeanette E. Stevens,

respectfully pray that a Writ of Certiorari issue to review the

April 20, 1994 Judgment and Opinion of the Oregon Court of Appeals.

OPINIONS BELOW

The opinion and judgment of the Oregon Court of Appeals dated April 20, 1994, is reported at 127 Or App 440, 873 P2d 380 (Or. 1994) and is reprinted in the Appendix attached hereto as App. A.

The Oregon Supreme Court's Order Denying Review was unpublished but disposition is reported at 319 Or 274 (June 21, 1994) and is represented in the Appendix attached hereto as App B.

The trial court's letter opinion and judgments of October 14, 1992 and December 14, 1992, are not reported and are reprinted as Appendix C.

STATEMENT OF JURISDICTION

Petitioners seek review from the Opinion and Judgment of the Oregon Court of Appeals of April 20, 1994.

The Supreme Court of the United States has jurisdiction to review cases from state courts by virtue of 28 USC Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution, in pertinent part, states:

> "No State . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The 1859 Act of Congress 11 Stat 383, (1859) admitting Oregon to the Union is set forth as App. D and provides as pertinent, as follows:

> "Section 4. That the following propositions are hereby offered to the said people of Oregon, to wit:

* * *

> Provided, that the foregoing propositions hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress may find necessary for securing the title in said soil to bona fide purchasers thereof. . ."

The Oregon Legislative Act of 1859, accepting admission to the Union, 1859 (First extra session p. 29) is set forth at App. D and provides, as pertinent, as follows:

> "Section 1
>
> * * *
>
> Be it ordained by the Legislative Assembly of the State of Oregon, that the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof; . . ."

STATEMENT OF THE CASE

Respondents (Stott, et al) filed a quiet title action alleging that their respective lots, platted in 1910, within a sub-division known as Brooklyn Addition, Cannon Beach, Oregon, extended westward to the eastern boundary of the Pacific Ocean's tidelands, owned by the State of Oregon. Thus, they argued, their ownership totally encompassed lands owned by Petitioners (Stevens) as described in their deed as lands lying between the Pacific Ocean and the west boundary of said Brooklyn Addition.

To aid the Court physically to locate the "mean high tide line," the "dry sand beach" and "the uplands", there is attached Appendix G, containing the U.S. Geological Survey's topographic map of Tillamook Head Quadrangle, and NW Cannon Beach. The blue portion thereon represents the Pacific Ocean to approximately the "mean high tide line". The stippled portion labeled "Cannon Beach" portrays the "dry sand" portion of Cannon Beach

between the "mean high tide line" and the "uplands". The greenish and improved portions represent the "uplands".

The trial court quieted title in favor of Petitioners (Stevens). App C. The Oregon Court of Appeals, reviewing the lower court's decision *de novo,* reversed the trial court. App. A. It ruled that the law, prior to 1935 and the decision in *Borax Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935), was that the littoral boundary separating State owned tidelands and privately held uplands was the "high water line assumed to be the vegetation line." App. A-4.

A Petition for Review was timely filed with the Oregon Supreme Court. The Oregon Supreme Court on June 21, 1994, denied discretionary review, App. B-3, thereby allowing the Court of Appeals' decision to stand as the law of the State.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) indicates review is warranted where a state court has decided a federal question in a way that conflicts with applicable decisions of this Court. The Oregon Court of Appeals misconstrued *Shively v. Bowlby,* 152 U.S. 1 (1894) and decided a federal question of the littoral tideland-upland boundary in Oregon which is directly contrary to over one hundred and fifty-two years of consistent decisions by this Honorable Court, starting with *Martin v. Waddell*, 41 U.S. 16 Pet. 369 (1842) through *Phillips Petroleum v. Mississippi,* 484 U.S. 469 (1988).

The significance of the holding is that Oregon now stands alone among littoral states in holding that from the moment of statehood in 1859 until 1935 (and the Supreme Court's decision in *Borax Ltd. v. Los Angeles,* 296 U.S. 10 (1935)) all federal patents of uplands conveyed title only to the uplands' vegetation line. Thus, the State of Oregon owned, under the Equal Footing Doctrine, not only the tide

lands but also the dry sand beaches and uplands up to the vegetation line. Nothing prevents other littoral states from similarly misconstruing *Shively v. Bowlby, supra,* and adopting the reasoning of *State ex rel Thornton et al v. Hay et al*, 254 Or 584, 462 P2d 671 (1969); thereby retroactively imposing a state-wide recreational easement upon that state's beaches, which deprives upland owners of exclusive possession of their privately owned beaches.

The specific errors of the court below and the national significance of them are:

I.

ONCE AGAIN,[2] OREGON'S APPELLATE COURTS IGNORE BINDING SUPREME COURT PRECEDENT IN DEFINING THE LITTORAL BOUNDARY BETWEEN STATE OWNED TIDELANDS AND PRIVATE UPLANDS.

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[2]In State ex rel Thornton, et al v. Hay, et al, 254 OR 584, 462 P2d 671 (1969) the Oregon Supreme Court, in dicta observed: "The Public's assumption that the dry sand, as well as the foreshore, was 'public property' had been reinforced by early judicial decisions. See Shively v. Bowlby, 152 U.S. 1 14th S Ct 548, 38 L.Ed. 331 (1894), which affirmed Bowlby v. Shively, 22 Or 410 30 P 154 (1892). These cases held that landowners claiming under federal patents owned seaward only to the 'high-water' line, a line that was then assumed to be the vegetation line." 254 Or at 589, 462 P2d at 674. (emphasis added)

The Thornton court went on to hold that the 'dry sands' of Oregon's beaches — that land lying between the tideland's mean high tide line and the upland's vegetation line — was subject to a recreational easement arising out of unbroken public usage, under the English common law doctrine of ancient custom. That decision was unsuccessfully challenged in Stevens v. City of Cannon Beach, 114 Or App 457 835 P2d 940 (1992) 317 Or 131 854 P2d 449 (1993) cert. den. ___ U.S. _____ 114 S Ct 1332, 127 L.Ed2d 679 (Justices Scalia and O'Conner dissenting) (3-21-94).

The intermediate Appellate Court's decision defines the Pacific Ocean's littoral boundary in Oregon, prior to 1935, as the upland's vegetation line. This decision is directly contrary to one hundred fifty-two years of controlling federal common law, describing the littoral boundary as "the ground that is between the ordinary high-water and low water mark." *Martin v. Waddell*, 41 U.S. 16 Pet. 367, 408-410, 414; (1842) *United States v. Pacheco,* 69 U.S. 2 Wall. 587,590 (1842); *Hardin v. Jordan,* 140 U.S. 371, 381 (1890); *Shively v. Bowlby*, 152 U.S. 1, 12 (1893); *Mann v. Tacoma Land Co.* 153 U.S. 273, 283 (1894); *McGilvra v. Ross*, 215 U.S. 70, 78-9 (1909); *Borax Ltd v. City of Los Angeles*, 296 U.S. 10, 22-3 (1935); *Phillips Petroleum Co., et al v. Mississippi*, 484 U.S. 469, 476, (1988) (O'CONNER, STEVENS & SCALIA dissenting)[3]

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[3]The dissenting opinion clearly re-enunciates this Court's definition of the tideland-upland boundary:

> "The borders of the ocean, which certainly is navigable, extend to the mean high tide line as a matter of federal common law. United States v. Pacheco, 2 Wall 587, 590 (1865); see

It has long been settled that the States, upon their admission to the Union, took title to their tidelands, under the Equal Footing Doctrine of the U.S. Constitution; *Pollards' Lessee v. Hagan*, 3 How 212 (1845); *Knight v. United States Land Association,* 142 U.S. 161 (1891). It has also been long settled that those tidelands are defined as the land between the ordinary low tide and ordinary high tide, i.e. "where the tide ebbs and flows and all of the land below ordinary high-water mark." *Shively v. Bowlby*, *supra* at 336-337, relying upon *Martin v. Waddell*, *supra,* and *United States v. Pacheco, supra.*

It is also undoubted that the extent of land conveyed by federal patent is a federal question, controlled by federal common law. *Borax Ltd v. City of Los Angeles, supra* at p. 7, 22. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977).

Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 376 (1977)." 484 U.S. at 490.

The lower court's error in placing the western boundary of a littoral federal patent at the vegetation line was caused by unsupported and incorrect *dicta* in the case of *State ex rel Thornton, et al v. Hay, et al, supra*, in which the Oregon Supreme Court stated:

> ". . .The public's assumption that the dry sand, as well as the foreshore, was 'public property' had been reinforced by early judicial decisions. See *Shively v. Bowlby*, 152 U.S. 1, 14 S Ct 548, 38 L. Ed. 331 (1893), which affirmed *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1894). These cases held that landowners claiming under federal patents owned seaward only to the 'high-water' line, a line that was then assumed to be the vegetation line." 254 Or at p. 589.

This *dicta* was unsupported by any historical citation or legal reference aside from the *Shively* cases. The Oregon Supreme Court misread *Shively v. Bowlby*.

Shively v. Bowlby expressly held that the "high-water mark" referred to the *ordinary* high tide line:

> 'The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong

> to the King, both in the shore of the sea and the shore of the arms of the sea.' Hargrave, Law Tracts, 11, 12:" 152 U.S. at p. 12. (emphasis added)

Justice Gray in *Shively* further stated:

> "In England, from the time of Lord Hale, it has been treated as settled that the tidal and the soil of the sea, or of the arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by expressed grant, or by prescription or usage. [English citations omitted]." 152 U.S. at p. 13 (emphasis added).

The *Shively* court relied upon the leading case of *Martin v. Waddell*, 41 U.S. 16 Pet 367 (1842), which Justice Gray described as: "The leading case in this court, as to the title and dominion of tide waters and the lands under them." *Id* at p. 15. It also cited *United States v. Pacheco*, 69 U.S. 2 Wall 587 (1842), wherein this Court stated:

> "By the common law, the shore of the sea, and, of course, of the arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow." *Id*. at p. 590.

Every case since *Shively v. Bowlby* has confirmed that the tideland's shoreward boundary has been the ordinary high water mark. Thus, the controlling federal common law for 152 years has been fixed. (See cases cited at page 9)

The *Thornton* court went on to incorrectly hold that *Borax* moved the tideland-upland boundary:

> "In 1935, the United States Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high tide line. *Borax Ltd. v. Los Angeles*, 296 U.S. 10. . . (1935). . ." *Id.* 254 Or at 590.

The Supreme Court in *Borax* did not change that boundary. It has always been the ordinary high tide line and remained so after *Borax*. The idea that *Borax* moved the littoral boundary from the vegetation line to the mean high tide line misreads *Borax*. The *Borax* decision expressly relied upon the prior authority of *United States v. Pacheco, supra, Hardin v. Jordan, supra; Shively v. Bowlby supra;* and *McGilvra v. Ross, supra,* all of which held that the tideland extends to the ordinary high-water mark.

Chief Justice HUGHES, speaking for the full *Borax* court, clearly defined the tidelands, consistent with prior authority:

> "The tideland extends to the high water mark. [citing *Hardin v. Jordan, Shively v. Bowlby* and *McGilvra v. Ross*]. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. [citation omitted] But by the common law, the shore is confined to the flux and reflux of the sea, at ordinary tides. [citation omitted] It is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow." 296 U.S. at pp. 22-3.

Borax's only contribution to the boundary question was its acquiescence in the California appellate court's adoption of the United States Coast and Geodetic Survey's scientific methodology in establishing the mean high tide line, (the average of ordinary low and high tides over 18.6 years). *Borax* represents no departure from the U. S. Supreme Court's long-standing definition of the littoral

boundary as being the ordinary high water mark, except that line is now described by the United States Coast and Geodetic Survey as the "mean high tide line."

The significance of the lower court's unique and sudden departure from controlling federal common law is that virtually all private littoral properties in Oregon trace their origins to federal patents, issued prior to 1935. Thousands of sales of beachfront property by sub-division lot descriptions occurred prior to 1935. Those initial sub-division lots' western boundaries may now be limited to the vegetation line. This results in a windfall to the State of Oregon; as it obtains legal title to the property between the mean high tideline and the vegetation line, i.e., the dry sand beach from statehood until 1935 and *Borax*, as the lower court construes the law. "Ownership" in the state is of paramount importance in Oregon due to the fact that Oregon's Supreme Court in *State ex rel Thornton et al v. Hay, et al supra*, in 1969, held a public recreational easement

existed upon Oregon's dry sand beaches based upon an ancient custom of such use. The English doctrine of ancient custom cannot prevail over the dry sands held by the federal government, prior to grants by federal patents, as such an inchoate servitude would be an impermissible cloud upon the federal government's title. *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co.*, 265 U.S. 742 (1924).

A challenge to *Thornton* on the ground that the doctrine's element of antiquity is lacking because such an inchoate claim could not cloud the United States' title was ignored by Oregon's appellate courts in the recent case of *Stevens v. City of Cannon Beach, et al,* 114 Or App 457, 835 P2d 940, (1992); 317 Or 131, 854 P2d 449 (1993); *cert. den.* _____ U.S._____, 114 S Ct 1332, 127 L.Ed2d 679 (Justices SCALIA and O'CONNER dissenting) (1994). Therefore, if the State of Oregon owned the dry sand beach as part of its tidelands upon admission to statehood, as the

lower court now declares, the problem of not being able to trace ancient recreational custom to times earlier than the issuance date of federal patents disappears, because of the states' ownership of the dry sand.

Even more troublesome is the fact that this decision opens the way for other littoral states to find ancient recreational use and, under the English doctrine of ancient custom, declare a recreational servitude over the entire coast line, as Oregon's high court has done. Such state courts, wishing to adopt Oregon's aggressive real property rules, will then be free to misconstrue *Shively v. Bowlby, supra*, and *Borax, supra*, thereby avoid the bar prohibiting collateral attacks upon federal patents. Adopting a rule that the state owned the dry sand from statehood to 1935, as the lower court has done in this case, and then declaring a continuous recreational use thereof, after 1935, as Oregon's *Thornton* case does, provides a method for other courts to accomplish what Oregon's appellate courts have achieved —

the destruction of private owner's exclusive possession of all littoral land between mean high tide and the upland's vegetation line.

II

THE DECISION BELOW, ESTABLISHING A NEW WESTERN BOUNDARY OF BEACHFRONT FEDERAL PATENTS IN OREGON, PRIOR TO 1935, CONSTITUTES AN IMPERMISSIBLE COLLATERAL ATTACK UPON SAID PATENTS AND SUCCEEDING TITLES.

The Court of Appeals' holding that, by law, a subdivision's western boundary extended only to the vegetation line in 1892 was used to infer that the dedicator of the Brooklyn Addition plat intended to convey only to that vegetation line, as that was all he owned under *Shively v. Bowlby*. The lower court's redefinition of the federal patent's boundary, and therefore its extent, is an impermissible collateral attack upon the federal patent,

contrary to the controlling federal law on that question, and this Court's consistent holding that such attacks are not permitted. *Barker v. Harvey*, 181 U.S. 481 (1901); *U.S. v. Title Insurance and Trust Company*, 265 U.S. 742 (1924); *Hughes v. State of Washington*, 389 U.S. 290 (1967) and *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977).

The lower court's ruling clearly impaired the efficacy of the grant and the use and enjoyment of the property by the grantee and Petitioners as successors — something prohibited by *Packer v. Bird*, 137 U.S. 661 (1891).

The effect of the holding, places Oregon alone among littoral states. And creates a unique cloud upon all littoral federal patents issued after Oregon's admission to statehood in 1859, up to 1935. This anomalous result is also contrary to Oregon's Admission Act of 1859 (11 Stat. 383) which bars the State from interfering with the primary disposal of the soil within the State by the United States.

(App. D 1-3). That limiting condition to statehood was expressly accepted by the first extra session of the Oregon legislature in 1859 (App. D 2-3).

III

THE DECISION BELOW, BY AN IPSE DIXIT RETROACTIVE RULING OF LAW, CONTRADICTS, NOT ONLY THE CONTROLLING FEDERAL LAW, BUT ALSO SUDDENLY CONTRADICTS ONE HUNDRED SEVENTEEN YEARS OF COMMON LAW AND STATUTORY LAW OF REAL PROPERTY IN OREGON.

Oregon's littoral real property law prior to 1935 extended uplands' west boundary to the ordinary high-water mark, consistent with the federal law. *Hinman v. Warren* 6 Or 408 (1877); *Andrus v. Knott*, 12 Or 501, 8 P 763 (1885); *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892); *Taylor Sands Fishing Co. v. Benson*, 56 Or 157, 108 P 126 (1920); *Hardy v. California Logan Powder Co.* 109 Or 76, 219 P 197 (1923)

and *Winston Bros. Co. v. State Tax Commission*, 156 Or 505, 62 P2d 7 (1937).

The lower court's unique relocation of the tideland-upland boundary is also inconsistent with the State's statutes concerning the tideland's shoreward boundary, which have always placed that boundary at ordinary high tide since 1907. *See*: 1907 Ore. Laws Ch 117; Or Code, 1930, § 60-301; OCLA § 106-301; Or Revised Statutes § 274.005 (8), (1967). (App. E 1-6)

In 1899, the state legislature declared the tidelands between extreme low tides and *ordinary high tides* was a public highway between the mouth of the Columbia River and the south boundary of Clatsop County (1890 Or Laws 3). That "highway," west of ordinary high tide line, was extended to the California border in 1913 (Ch. 47, § 1, 1913 Or Laws 80). (App. E 6-7)

In addition, the States' own practice in the sale of its tidelands refutes the holding that its' title went to the

vegetation line. In fact, the shoreward boundary in the State's grants were "along ordinary high-water mark". See copy of surveys supporting a State sale to G.E. Grimes in 1884 attached as Appendix F. Note that the State's printed forms provide that the shoreward boundary of the tidelands conveyed is at the "ordinary high-water mark" and not the vegetation line. Therefore, the State of Oregon was never confused about the tidelands boundary.

Whether a constitutional right is not given due recognition by a state court is a question that may be invoked by adversely affected citizens before the Supreme Court. And if the Court determines the grounds upon which the denial is based is without fair and substantial support, reversal must follow. *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Appleby v. New York*, 271 U.S. 364, 380 (1926).

The Court below, by its retroactive ruling, adversely affects Petitioners' property as well as placing a cloud upon other littoral property owners' title in Oregon. The decision

based upon a misreading of *Shively* and *Borax* causes a deprivation of property without due process of law. Its effect is the same as Justice Stewart warned against in his concurring opinion in *Hughes v. State Of Washington*, 389 U.S. 290 (1967), that:

> ". . .[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." 389 U.S. at p. 296-297.

To further paraphrase *Hughes v. State of Washington, supra,* the court below affected a retroactive transformation of Petitioner's predecessors in title private property into public property for seventy six years between 1859 and 1935. Based upon that fictional transformation, the court below ruled that Petitioners had no title to their acreage lying between the sub-division and the ocean's mean high tide line.

CONCLUSION

Oregon's appellate courts, in misconstruing *Shively v. Bowlby, supra,* and *Borax Ltd. v. Los Angeles, supra,* have set it apart from other littoral states and in direct conflict with this Court's repeated holdings that the ocean's tideland boundary is the ordinary mean high tide line. The conflict, while applying for the period from Oregon's admission to statehood (1859) to 1935, is significant in Oregon, as well as potentially significant in other littoral States, as the rule of law announced below can be used by other States to avoid the bar against collateral attacks upon federal patents in a future declaration of a recreational easement, based upon ancient custom, covering that State's beaches.

In addition, the rule of law announced by the court below constitutes an interference with the United States' initial disposal of land in Oregon, in violation of Oregon's Admission Act. It further constitutes an impermissible cloud upon Petitioner's and other similarly situated beach front

owner's title traced to the original patent and deprives them of due process of law.

DATED: September 12, 1994.

*Garry P. McMurry
*Counsel of Record
Garry P. McMurry & Associates
435 Benj. Franklin Plaza
One S.W. Columbia
Portland, Oregon 97258
Attorney for Petitioners

Index to Appendices

	Appendix
Oregon Court of Appeal's Decision	A 1-9
Oregon Supreme Court's Denial of Review	B 1-3
Circuit Court Judgments and Letter Opinion	C 1-12
Oregon's Admission Act and Oregon's Acceptance Act	D 1-6
1907 Ore. Laws Ch. 117, 1930 Ore. Code 60-301, OCLA 106-301, Ore. Rev. Stat. 274.005(8), 1899 Ore. Laws 3, 1913 Ore. Laws 80	E 1-7
Surveys of Tidelands granted by State of Oregon to G. K. Grimes 1884	F 1-4
Topographical Map Cannon Beach Coast & Geodetic Survey	G 1-2

APPENDIX A

440 No. 219

IN THE CIRCUIT COURT OF APPEALS OF THE STATE OF OREGON

Peter W. STOTT,
L. John Harrington, James F. Wells,
Kathryn E. Kendall, Josephine W. Hatfield,
Walter T. Williamson, III, Judith A. Garling,
Willaim A. Jack and Evelyn J. Jack, as Trustees
of the Willialm A. Jack Family Trust,
Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr.,
and Joelyn U. Groom, as Trustee of the
Separate Property Trust of Jocelyn U. Groom,
Appellants,

v.

Irving C. STEVENS
and Jeannette E. Stevens,
Husband and Wife,
Respondents.

Irving C. STEVENS
and Jeannette E. Stevens,
Husband and Wife,
Third-Party Plaintiffs,

v.

CITY OF CANNON BEACH,
State of Oregon, by and through
its Division of State Lands, the
Land Conservation and Development
Commission, and Parks & Recreation Division,
Third-Party Defendants.
(91-2248; CA A77993)

Appeal from Circuit Court, Clatsop County
Thomas E. Edison, Judge.
Argued and submitted November 23, 1993

Jacob Tanzer argued the cause for appellants. With him on the opening brief were Bruce W. DeKock and Ball, Janik & Novack. With him on the reply brief were Sarah J. Ryan, Bruce W. DeKock and Ball, Janik & Novack.

Garry P. McMurry argued the cause for respondents. With him on the brief was Garry P. McMurry & Associates.

Before Warren, Presiding Judge, and Rossman, and Edmonds, Judges.

EDMONDS, J.

Reversed and remanded for entry of judgment quieting title in plaintiffs.

EDMONDS, J.

Plaintiffs appeal from an adverse judgment in their quiet title claim.[1] They assign error to the court's ruling that, at the time their property was platted in 1910, the grantors reserved property between their property and the Pacific Ocean and that defendants are the owners of that property. On *de novo* review, ORS 19.125(3), we reverse.

Plaintiffs are the present owners of residential lots 2 through 9 in block 1 of the Brooklyn Addition in Cannon Beach, originally platted by August and Sarah Becker. *See* Appendix. The western part of their property is on a bluff that overlooks the ocean. Defendants contend that, when the Brooklyn Addition was platted in 1910, the Beckers reserved a strip of property that has expanded by accretion between the western boundary of the plat and the ocean. Defendants claim ownership of the purported strip based on a quitclaim deed from an heir of the Beckers. Plaintiffs contend that the Brooklyn Addition borders the ocean.

In 1856, the United States government surveyed the area around Cannon Beach. The survey established Government Lot 1 (Lot 1). The survey shows Lot 1

---

[1]Plaintiffs also brought claims for nuisance and trespass, which were bifurcated for trial pending the outcome of the quiet title claim. Defendants' third-party claims against the State of Oregon and the City of Cannon Bech were also bifurcated pending the outcome of the quiet title claim. The judgment dismisses all pending claims either on the motion of the plaintiffs or because they are moot.

extending west to the meander line of the ocean. The survey also established a meander corner at the northwest corner of Lot 1 and a meander line that denotes the boundary with the ocean. The parties agree that, in 1910, the high-water line came to the base of the bluff. Plaintiffs contend that, at times, it came even higher. The high-water line is significant because, in 1910, landowners claiming under federal patents owned seaward only to the high-water line, which is assumed to be the vegetation line. In 1935, the Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. *State ex rel Thornton v. Hay*, 254 Or 584, 589, 462 P2d 671 (1969); *see Borax, Ltd. v. Los Angeles,* 296 US 10, 56 S Ct 23, 80 L Ed 9 (1935). The present distance from the western boundary of the Brooklyn Addition to the vegetation line is approximately 20 feet. The record indicates that since 1940, a considerable amount of sand has been deposited on the Cannon Beach area. The bluff on which the western boundary lies is now buried under at least five feet of sand. The record indicates that the distance from the western boundary of the Brooklyn Addition to the present mean high tide is approximately 380 feet.

In 1886, John Boysen filed for a homestead with the federal government, which included Lot 1. One month later, he conveyed all of his interest in the homestead application to August Becker.[2] In 1910, the Beckers platted the northwest portion of Lot 1 as the Brooklyn Addition. The plat refers to the northwest corner of the plat as the "gov

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[2]Boysen did not obtain his United States government patent until 1892.

[sic] meander corner." The 1856 survey established the distance between an adjacent section corner and the government meander corner as 891 feet. No monument establishing the meander corner can be located at this time. The distance from the adjacent section corner to the plat's initial starting point combined with the internal measurements of the plat extend along the northern boundary of Lot 1, 897 feet from the section corner to the northwest corner, or six feet more than the government survey. The western boundary of the plat takes a meandering course southward to the southwestern corner of the plat. The southwest corner of the plat lies six feet farther west than the northwestern corner. The parties agree that the government meander line is at least six feet east of the designated plat boundary.

Following the trial on plaintiffs' claim, the court said that the issue

> "must be determined by finding whether or not the plat of Brooklyn Addition is bounded on the West by the Pacific Ocean. This requires determining whether the intent of the platters [the Beckers] was to convey to the Pacific Ocean or merely to the Westerly boundary of the plat."

It then reasoned that the Beckers' intent could best be determined by examining their conduct in platting other parcels in the Cannon Beach area. It observed that the Beckers had expressly platted to the ocean in other plats,

and that in the Brooklyn Addition, there was no mention of the western boundary being the ocean. The court was also impressed by the fact that there is a "heavy line" depicted on the western side of the plat. It concluded that the Beckers intended to reserve a strip of land west of the western boundary of the Brooklyn Addition.

Accreted land belongs to the owner of the land adjacent to the water. *See California ex rel State Lands Comm. v. United States,* 457 US 273, 284-84, 102 S Ct 2432, 73 L Ed 2d 1 (1982). When the property conveyed is bounded by water, it is presumed[3] that the grantee intended to convey all the land that the grantee owned unless a contrary intent is clearly shown. *McAdam v. Smith,* 221 Or 48, 55, 350 P2d 689 (1960). When a property description in a legal document refers to a property description in another legal documents, the reference is considered as if the description is incorporated therein. *Templeman et al v.*

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[3]OEC 308 provides:

"In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

The legislative commentary to this rule explains that, once a party invoking a presumption establishes the basic facts giving rise it it, the burden of establishing the nonexistence of the presumed fact shifts to the opposing party. Moreover, the commentary provides that all presumptions, whether legislatively or judiciallly created, must be treated in the manner prescribed by OEC 308.

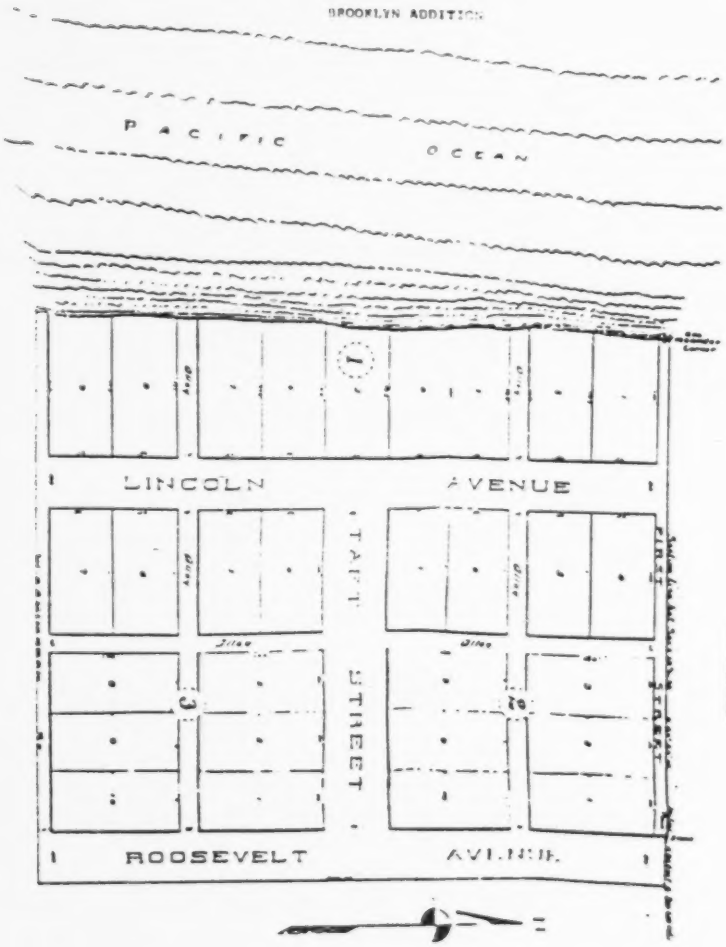
Leigh, 130 Or 24, 30, 278 P 989 (1920). A meander line in a description indicates that the water itself is the true boundary. *Seabrook v. Coos Bay Ice Co.*, 49 Or 237, 89 P 417 (1907). Therefore, a grant to the meander line is presumed to be a grant to the water. *Morse Bros., Inc. v. Wallace,* 78 Or App 138, 140 n 2, 714 P2d 1095, *rev den* 301 Or 165 (1986). Moreover, even if a description in a plat is ambiguous, there is a policy against construing conveyances so as to create strips of land, the title to which would remain in abeyance for lengthy periods. *Nelson v. Vandemarr,* 281 Or 65, 68, 573 P2d 1232 (1978).

We apply those rules to the evidence in this case. The plat describes its northwest corner as the government meander corner. That description evidences the Beckers' intent that the property platted was to extend to the ocean. That inference is supported by the fact that the western boundary of the plat is a meandering line and the southwest corner of the plat is six feet farther west than the northwestern corner. The fact that the internal measurements of the plat places the northwest corner of the plat six feet farther west than the government meander corner does not create a contrary inference. The record indicates that it was the practice of the government surveyors to establish meander corners back from a bluff edge by as much as ten feet to avoid the corner from being lost because of erosion. There is evidence that, in 1910, the high-water mark extended nearly to the top of the bluff, which is also consistent with the location of the northwest corner of the plat at the ocean.

The evidence that persuaded the trial court is less compelling. The trial court found the "heavy line" along the western boundary "cartographically significant." The parties disagree as to whether the "wavy lines" on the plat represent the ocean tides or beach. The "heavy line" could be the result of the drafter's overlap between the plat's western boundary line and the high tide lines. The fact that other plats by the Beckers characterize the western boundary by a monument, the ocean, is not controlling. The Brooklyn Addition plat was surveyed by a different surveyor. It relies on a metes and bounds description and a map. It is equally as plausible that the surveyor of the Brooklyn Addition plat chose a different method of describing the same boundaries as it is that the Beckers intended to reserve a strip of land along the ocean in one plat and not the other. In the final analysis, the most persuasive fact is that the Brooklyn addition plat makes an express call to the government meander corner, *i.e.,* the ocean. Based on all the evidence and the rules of construction, we find that the Beckers did not reserve a strip of land west of the land owned by plaintiffs.

Reversed and remanded for entry of judgment quieting title in plaintiffs.

APPENDIX


BROOKLYN ADDITION
PACIFIC OCEAN
LINCOLN AVENUE
TAFT STREET
ROOSEVELT AVENUE

APPENDIX B

273

PETITIONS FOR REVIEW ALLOWED AND DENIED

ALLOWED
June 21, 1994

State v. Clevland, Elizabeth A. (A76961)(S41302) (127 Or App 559)
State v. Fleetwod, Jerry Lee (A77709)(S41311) (127 Or App 558)
State v. Matthews, Robert William (A79394)(S411114) (126 Or App 154)
State v. Van Hoomissen, George Thomas Jr. (A78558) (S41295)(125 Or App 682)

June 28, 1994

Ososke v. Motor Vehicles Division (A83576)(S41329) (on dismissal)
Washington County Police Officers Association v. Washington County (75956)(S41350)(127 Or App 545)(Employment Relations Board's petition)
Washington County Police Officers Associationv. Washington County (A75956)(S41346)(127 Or App 545)(Washington County's petition)

DENIED
June 21, 1994

Blodgett, Jerry Burton v. Grill (A79728)(S41355) (127 Or App 206)

Catlin, Michael L. v. Board of Parole and Post-Prison Supervision (A78321)(S41343)(127 Or App 409)

Lewis v. Pacific Northwest Bell Telephone Companpy (A75346)(S41276)(126 Or App 544)

Macnab, Loren Edward v. Board of Parole and Post-Prison Supervision A77966)(S41358)(127 Or App 754)

McGann v. Boyd and Hoefflin A74194)(S40858)(127 Or App 409). Graber, J., would allow.

Nero v. City of Tualatin (A80583)(S41317)(127 Or App 458)

Oregon State Shooting Association v. Multnomah County (A72067)(S41131)(122 Or App 540)(Oregon State Shooting Assn's petition), Van Hoomissen and Fadeley, JJ., would allow.

Oregon State Shooting Association v. Multnomah County (A72067)(S41145)(122 Or App 540)(Multnomah County's petition), Van Hoomissen and Fadeley, JJ., would allow.

Pierce, Larry Ray v. Board of Parole and Post-Prison Supervision (A79189)(S41306)(127 Or App 754)

Pulfrey, Michael Allen v. Zenon (A79698)(S41299)(127 Or App 206).

Scott, Sidney Walter v. Zenon A79958)(S41345)(127 Or App 137).

State Accident Insurance Fund Corporation v. Salem Decorating Center, Inc. A80535)(S41284)(127 Or App 206).

State v. Dickhous, Robert Louis (A76720)(S41354)(127 Or App 562).

State v. Floyd, Bruce Leroy (A79291/92)(S41333)(127 Or App 754)

State v. Gable, Frank Edward (A71159)(S41282)(127 Or App 320), Unis J., would allow.

State v. Lucas, Glen H., (A77782)(S41308)(127 Or App 561). Fadeley and Unis, JJ., would allow,

State v. Real, Frank Raymond (A79195)(S41347)(127 Or App 562).

Stott v. Stevens/Stevens v. City of Cannon Beach (A77993)(S41328)(127 Or App 440)

Summy, Robert Dvid v. Board of Parole and Post-Prison Supervision (A79825)(S41360)(127 Or App 754).

Tucker, Edward Wilbur v. Maass (A80699)(S41337)(127 Or App 562).

June 28, 1994

Meriweather, Thomas Nicholas v. Board of Parole and Post-Prison Supervision (A79541)(S41359)(127 Or App 754).

State v. Carpenter, Virgil (A77933)(S41312)(127 Or App 754).

State v. George, Tom McNeil (A80163)(S41357)(127 Or App 581), Durham, J., would allow.

State v. Willilams, Shawn Lavette A76383S41335127 Or App 574), Fadeley and Unis, JJ., would allow.

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE

OF OREGON

FOR THE COUNTY OF CLATSOP

PETER W. STOTT, L. JOHN HARRINGTON; JAMES F. WELLS; KATHRYN E. KENDALL; JOSEPHINE W. HATFIELD; WALTER T. WILLIAMSON, III; JUDITH A. GARLING; WILLIAM A. JACK and EVELYN J. JACK, as trustees of the William A. Jack Family Trust; SUSAN U. RICK; JOHN M. ULRICH, WARREN J. ULRICH, JR., and JOCELYN U. GROOM, as trustee of the Separate Property Trust of Jocelyn U. Groom, Plaintiffs, v.	Case No. 91-2248 **JUDGMENT**

BALL, JANIK & NOVAK
Attorneys at Law
101 S.W. Main Street
Portland, Oregon 97204
Telephone (503)228-2525

Irving C. Stevens and Jeannette E. Stevens, Husband and Wife,

Defendants.

IRVING C. STEVENS and JEANNETTE E. STEVENS, Husband and Wife,

Third-Party Plaintiffs,

v.

CITY OF CANNON BEACH, STATE OF OREGON, by and through its Division of State Lands; the Land Conservation and Development Commission; and Parks & Recreation Division,

Third-Party Defendants.

THIS MATTER having come before the Court on Plaintiff's Notice of Dismissal, the court finds that all of

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plaintiffs' claims have been disposed of either by dismissal or by trial of the quiet title action and that the remaining claims (third party claims by the Stevens against the State of Oregon and City of Cannon Beach) are moot, that all claims are disposed of,

THE COURT THEREFORE ADJUDGES AS FOLLOWS:

1. The Court incorporates and adopts the judgment attached as Exhibit A and entered on or about October 14, 1992.

2. The Court dismisses plaintiffs' nuisance and trespass claims without prejudice, the remainder of the case is moot.

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3. Defendant Stevens have already submitted a cost bill which has been ruled upon by the Court and no further costs are allowed.

DATED this 14th day of December, 1992.

/s/ Thomas E. Edison
Thomas E. Edison
Circuit Court Judge

SUBMITTED BY:

Sarah J. Ryan, OSB #83131
Of Attorneys for Plaintiffs

BALL, JANIK & NOVAK
Attorneys at Law
101 S.W. Main Street
Portland, Oregon 97204
Telephone (503)228-2525

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF CLATSOP

PETER W. STOTT, Plaintiff, IRVING C. STEVENS and JEANETTE E. STEVENS, Husband and Wife, Defendants.	No. 91-2248 INTER-LOCUTORY JUDGMENT QUIETING TITLE IN FAVOR OF DEFENDANTS
IRVING C. STEVENS and JEANETTE E. STEVENS, Husband and Wife, Third-Party Plaintiffs, v. CITY OF CANNON BEACH; STATE OF OREGON, by and through its Division of State Lands;	

1 - INTERLOCUTORY JUDGMENT QUIETING TITLE IN FAVOR OF DEFENDANTS

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the Land Conservation and Development Commission; and Parks & Recreation Division,

Third-Party Defendants.

The parties, having stipulated to bifurcation of the trial of plaintiff's first claim for relief quieting plaintiff's title as against defendants to the land west of Brooklyn Addition to the mean high tide line of the Pacific Ocean, separate from the second claim for relief (nuisance) and third claim for relief (trespass) and the court having ordered the bifurcation of trial on May 28, 1992.

The segregated quiet title action by stipulation was heard by t he court without a jury on September 15 and 16, 1992, plaintiff being represented by Sarah J. Ryan and defendants being represented by Garry P. McMurry.

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The court having heard the testimony of the parties and their witnesses and having reviewed the exhibits offered and following review of the trial memorandum of law submitted by the parties and being fully advised in the premises: Enters its judgment and decree that title to the contested property is quieted and vested in defendants Irving C. Stevens and Jeanette E. Stevens; said property being described as follows:

> "Beginning at the southwest corner of Brooklyn addition and following a westerly extension of the southern boundary of Brooklyn Addition to the Pacific Ocean, thence, proceeding northerly, following the meanders of the Pacific Ocean to a point intersecting a western extension of the northern boundary of Brooklyn Addition, thence proceeding easterly along the westerly extension of the northern boundary of Brooklyn Addition to the northwest corner of the

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Brooklyn Addition, thence proceeding southerly following the western boundary of Brooklyn Addition to the point of beginning."

Costs and disbursements are taxed against plaintiffs and in favor of defendants in the amount of $341.88.

SUMMARY OF MONEY JUDGMENT

The following is a summary of the Judgment of the Court:

Judgment Creditors:	Irving C. Stevens and Jeanette E. Stevens
Judgment Creditor's Attorney:	Garry P. McMurry, OSB #58062, One Southwest Columbia Street, Suite 435, Portland, Oregon 97258
Judgment Debtors:	Peter W. Stott; L. John Harrington; James F. Wells; Katherine E. Kendall; Josephine W. Hatfield; Walter T. Williamson III; Judith Garling; William A. Jack and

GARRY P. McMURRY & ASSOCIATES
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	Evelyn J. Jack, as Jack family trust; Susan U. Rick; John M. Ulrich, Warren J. Ulrich, Jr. and Jocelyn U. Groom as trustee of the separate property trust of Jocelyn U. Groom.
Amount of Judgment	$0.00
Amount of Costs and Disbursements:	$341.88

The attorney presenting this judgment hereby certifies the information contained in this summary accurately reflects the judgment of the court.

Garry P. McMurry, OSB No. 58062

DATED this 14th day of October, 1992.

/s/ Thomas E. Edison
Thomas E. Edison
Clatsop County Circuit Court
Judge

Presented by:
Garry P. McMurry, OSB No. 58062
Attorney for Defendants

GARRY P. McMURRY & ASSOCIATES
Attorneys at Law
One S.W. Columbia Street
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THOMAS E. EDISON
circuit judge

P.O. Box 835
TEL: (503) 325-8555
FAX (503)325-8606

Circuit Court of Oregon
CLATSOP COUNTY COURTHOUSE
ASTORIA, OREGON 97103

September 22, 1992

Ms. Sarah J. Ryan
Ball, Janik & Novak
Attorneys at Law
101 S.W. Main
Portland, OR 97204

Mr. Garry P. McMurry
Attorney at Law
One S.W. Columbia
Portland, OR 97258

Re: Stott, et al. v. Stevens
Clatsop County No. 91-2248

Dear Counsel:

Trial in the above captioned matter commenced on September 15, 1992 and after argument the case was taken under advisement for decision. An opinion will follow.

This is a quiet title suit in which the plaintiffs seek to establish title to the land formed by accretion to Block 1, Brooklyn Addition, to the City of Cannon Beach, Clatsop

County, Oregon. The land in question lies Westerly or seaward of said Block 1. Defendants claim ownership through a quit claim deed from the heirs of August and Sarah Becker. The defendants have also in 1988 attempted to quiet title to the said property through a suit of their own in this court.

The issue of which of the parties owns the beach land in question and the accretion thereto must be determined by finding whether or not the plat of Brooklyn Addition is bounded on the West by the Pacific Ocean. This requires determining whether the intent of the platters August and Sarah Becker was to convey to the Pacific Ocean or merely to the Westerly boundary of the plat.

I believe that the intent of the Beckers may best be determined by looking to their actual pattern of conduct in platting various parcels in the Cannon Beach area. It appears that the Beckers were owners of substantial amounts of real property in Cannon Beach. They filed plats of several additions both before and after platting Brooklyn Addition. In each of the other plats they expressly platted to the Pacific Ocean as the Western boundary thereof. In the Brooklyn Addition alone, there was no mention of the Westerly boundary being the Pacific Ocean and in fact there is a heavy line on the plat indicating the Western boundaries of the Lots in question in Block 1. This appears to be a deviation from what otherwise was an ordinary and usual course of conduct. Curiously enough, both parties point to this deviation as being supportive of an intent to plat to the Pacific Ocean on the one hand and an opposite intent on the other hand.

In my analysis, it appears that the Beckers in making the deviation concerning Brooklyn Addition intended a different result from their usual practice in conveying to the ocean. I find that their intention was to convey to the indicated Western boundary line of the lots in question. I further find from the evidence that the Western boundary line indicated on the plat is cartograpahically significant in expressing that intent. I therefore conclude that plaintiffs have failed to prove their contentions by a preponderance of the evidence and I therefore will allow judgment in favor of the defendants.

I believe that should further note that I am not influenced in reaching this decision by the evidence that the Clatsop County Assessor and certain title insurance companies also agree that the defendants own the land in question. It appears that none of those parties probably had the fund of evidence before them that I have and their opinions are not particularly helpful even though they agree with me. I also do not find the defendants previous quiet title suit to be of assistance. As the defendants stated, they did not believe the plaintiffs to be owners of the property they claim when they filed their suit and therefore gave them no personal notice. In light of what I have previously stated herein, I agree with that point of view.

I will ask Mr. McMurry to prepare an appropriate decree and judgment.

Very truly yours,

THOMAS E. EDISON
Circuit Judge

TEE:st

APPENDIX D

Oregon Admission Acts

(1993 EDITION)

---

act of congress admitting oregon into union

[Approved February 14, 1859]

Preamble. Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States; Therefore —

* * *

Section 2. Jurisdiction over waters forming boundary of state; use of navigable waters as free highways. That the said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said State, and any other State or State now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

* * *

Section 4. Certain propositions offered to people of Oregon for acceptance or rejection. That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. Third, that ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each. shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying

within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided, however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act. [11 Stat. 383 (1859)]

* * *

ACCEPTANCE BY OREGON OF PROPOSITIONS OFFERED BY CONGRESS IN ADMISSION ACT

[APPROVED June 3, 1859]

Whereas, the Congress of the United States did pass an act, entitled "An Act for the admission of Oregon in the Union," approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the people of the State of Oregon, in the

words following: "§4. The following propositions be, and the same are hereby, offered to the said people of Oregon, for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid , but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: Provided, That no salt spring or land, the right whereof is vested in an individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State, which shall be sold by Congress after the admission of said State into the

Union, after deducting all the expenses incident to the same, shall be paid to said State for the purpose of making public roads and internal improvements, as the legislature shall direct: Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: Provided, however, That in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act," Therefore,

Section 1. Be it enacted by the Legislative Assembly of the State of Oregon, That the six propositions offered to the people of Oregon in the above-recited portion of the act of Congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

Be it ordained by the Legislative Assembly of the State of Oregon, That the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof; and that in no case shall non-resident

proprietors be taxed higher than residents. And that the said State shall never tax the lands or property of the United States within said State. [1859 (First extra session) p. 29]

APPENDIX E

CHAPTER 117.

AN ACT

"*Be it enacted by the People of the State of Oregon:*

Section 1. The Governor is hereby appointed Land Commissioner for the State of Oregon, and empowered to locate or select the lands to which the State is entitled under the laws of the United States, or otherwise, and he shall be allowed all necessary expenses incurred by him in the performance of the duties prescribed by this act; and he is hereby authorized to appoint such agent or agents as may be necessary in the performance of his duties.

* * *

Section 4. For the purpose of this act the state lands shall be classified as follows:

(a) *School Lands.* Sections 16 and 36 in each township granted to the State by act of Congress approved February 14, 1859; all lands selected for internal improvements under the act of Congress of September 4, 1841, and all lands selected for capitol building purposes under the act of Congress approved February 14, 1859.

(b) *Indemnity Lands.* Lands selected to satisfy losses in sections 16 and 36, as provided by the laws of the United States.

(c) *University Lands.* Lands granted to the State by the United States for the support and maintenance of the State University.

(d) *College Lands.* Lands granted to the State for the support and maintenance of the State Agricultural College.

(e) *Swamp Lands.* Land claimed by the State under the act of Congress, approved September 28, 1850, and extended to the State of Oregon, by an act of Congress, approved March 12, 1860.

(f) *Tide and Overflow Lands.* All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and all islands, shore lands, and other such lands held by the State by virtue of her sovereignty.

(g) *Farm Lands.* Lands acquired by deed, gift, operation of law, or by the foreclosure of mortgages taken to secure loans from the school, college, university, or other funds."

* * *

(1907 Ore. Laws, Ch. 117)

CHAPTER III.

SALE AND DISPOSAL OF STATE LANDS.

* * *

60-301. **Classification of state lands.** — For the purpose of this act the state lands shall be classified as follows:

(a) School Lands — Section 16 and 36 in each township granted to the state by act of congress approved February 14, 1859; all lands selected for internal

improvements under the act of congress of September 4, 1841, and all lands selected for capitol building purposes under the act of congress approved February 14, 1859.

(b) Lieu Lands — Lands selected to satisfy losses in sections 16 and 36, as provided by the laws of the United States.

(c) University Lands — Lands granted to the state by the United Stats for the support and maintenance of the state university.

(d) Agricultural College Lands — Lands granted to the state for the support and maintenance of the state agricultural college.

(e) Swamp Lands — Land claimed by the state under the act of congress, approved September 28, 1850 and extended to the state of Oregon, by an act of congress, approved March 12, 1860.

(f) Tide and Overflow Lands — All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and all islands, shore lands, and other such lands held by the state by virtue of her sovereignty.

(g) Farm Lands — Lands acquired by deed, gift, operation of law, or by the foreclosure of mortgages taken to secure loans from the school, college, university, or other funds. [L. 1907, ch. 117 § 4; L. O. L. § 3881; O. L. § 5554]"

(Ore. Code 1930, 60-301)

CHAPTER 3
SALE AND DISPOSAL OF STATE LANDS

* * *

ARTICLE 1

GENERAL PROVISIONS

§ 106.301. State lands, how classified. For the purpose of this act the state lands shall be classified as follows:

(a) School Lands — Sections 16 and 36 in each township granted to the state by act of congress approved February 14, 1859; all lands selected for internal improvements under the act of congress of September 4, 1841, and al lands selected for capital building purposes under the act of congress approved February 14, 1859.

(b) Lieu Lands — Lands selected to satisfy losses in sections 16 and 36, as provided by the laws of the United States.

(c) University Lands — Lands granted to the state by the United states for the support and maintenance of the state university.

(d) Agricultural College Lands — Lands granted to the state for the support and maintenance of the state agricultural college.

(e) Swamp Lands — Land claimed by the state under the act of congress, approved September 28, 1850, and extended to the state of Oregon, by an act of congress, approved March 12, 1860.

(f) Tide and Overflow Lands — All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and all islands, shore lands, and other such lands held by the state by virtue of her sovereignty.

(g) Farm Lands — Lands acquired by deed, gift, operation of law, or by the foreclosure of mortgages taken to secure loans from the school, college, university, or other funds. [L. 1907, ch. 117 § 4, p. 206; L. O. L. § 3881; O. L. § 5554; O. C. 1930, § 60-301.]"

(OCLA 106-301)

SUBMERSIBLE AND SUBMERGED LANDS

GENERAL PROVISIONS

274.005 Definitions. As used in ORS 274.005 to 274.060 and 274-205 to 274.990, unless the context requires otherwise:

(1) "Director" means the Director of the Division of State Lands.

(2) "Division" means the Division of State Lands.

(3) "Line of ordinary high water" means the line on the bank or shore to which the high water ordinarily rises annually in season.

(4) "Line of ordinary low water" means the line on the bank or shore to which the low water ordinarily recedes annually in season.

(5) "Land" includes water, water rights, easements of every nature and all appurtenances to land.

(6) "Material" includes gravel, rock, sand and silt, but does not include hard minerals subject to ORS 274.610, or oil, gas and sulphur subject to ORS 274.705 to 274.860.

(7) "Submerged lands," except as provided in ORS 274.705, means lands lying below the line of ordinary low water of all navigable waters within the boundaries of this

state as heretofore or hereafter established, whether such waters are tidal or nontidal.

(8) "Submersible lands," except as provided in ORS 274.705, means lands lying between the line of ordinary high water and the line of ordinary low water of all navigable waters and all islands, shore lands or other such lands held by or granted to this state by virtue of her sovereignty, wherever applicable, within the boundaries of this state as heretofore or hereafter established, whether such waters or lands are tidal or nontidal."

ORS 274.005

AN ACT [S.B. 125]

To make the sea shore of the Pacific ocean, in Clatsop county a public highway.

Be it enacted by the legislative assembly of the state of Oregon:

That the shore of the Pacific ocean, between ordinary high and extreme low tides, and from the Columbia river on the north to the south boundary line of Clatsop county on the south, is hereby declared a public highway, and shall forever remain open as such to the public.

Approved January 25, 1899.

1899 Ore. Laws. 3

CHAPTER 47

AN ACT

To amend Section 6369 of Lord's Oregon Laws.

Be it enacted by the People of the State of Oregon:

Sec. 1. That Section 6369 of Lord's Oregon Laws be and the same is hereby amended to read as follows:

Sec. 63-69. The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California State line on the south, excepting such portion or portions of such shore as may have heretofore been disposed of by the State, is hereby declared a public highway and shall forever remain open as such to the public.

Filed in the office of the Secretary of State February 13, 1913

(1913 Ore. Laws 80)

APPENDIX F

SURVEY.

RULES and REQUIREMENTS of the BOARD.

No Tide Lands will be sold which do not front upon lands over which the U. S. Surveys have been extended.

The initial point must be on the meander line and at the corner of some legal subdivision of the U. S. Survey.

The meander line of high-water mark should coincide with the U. S. meander line, unless it is manifestly incorrect, and should continue up to the corner of some legal subdivision of the U. S. Survey.

The lines across tide lands must be E. & W. or W. S. and must be in extension of the lines of the subdivisions adjacent and must extend to low tide mark.

The meander line of low water mark must be at the line of low tide and must include all of the tide land.

Field notes of the survey of the Tide Lands fronting or abutting upon Lot 8 of Section 16 T. 6 S. R. 10 W. of the Willamette Meridian, Oregon.

Beginning at a point on the U. S. Meander Line 20 chs W from E of the Meander corner on the East [illegible]

THENCE

Course	Distance	
[illegible]	20.00	Along ordinary high-water mark.
West	0	Along Tide Line
S [illegible]	20.00	Along Tide Line
East	0	Along Tide Line

I, [illegible] County Surveyor of [illegible] County, do hereby certify that on the [illegible] day of February 1891, at the request of [illegible] I surveyed the Tide Lands lying in front of Sec. 16 Tp. 6 S. R. 10 W.; that the foregoing are the true and correct returns of said survey; that all of the lands embraced in said survey are Tide Lands, and that said survey includes all of the Tide Lands in front of said Lot, and contains 20.00 acres, and that from my examination, and from such other information as I have been able to obtain, I believe the present value of said lands to be $25 per acre.

[illegible]
County Surveyor of [illegible] County

APPLICATION TO PURCHASE.

To the Board of Commissioners for the Sale of School Lands &c., of the State of Oregon:

I hereby apply to purchase the Tide Lands embraced in the foregoing survey, and I herewith tender you the appraised value thereof, to-wit: ..... *Dollars.*

This application is made with full knowledge of the character of the land applied for and of the title of the State thereto, and I hereby waive and relinquish all right to and claim upon the State for the return of the purchase price of said lands in case said lands or any part thereof should be found to be not Tide Lands.

STATE OF OREGON,
County of ..... } ss.

I, ... *being first duly sworn say, that I am over 18 years of age; that I* ..... *citizen of the United States; that I am a citizen of this State; that I have not directly nor indirectly made any previous purchase of lands from the State, nor has any person for me, which, together with the lands described in the above application, would exceed three hundred and twenty acres. That the above application is made to purchase lands for my own use, and not for purposes of speculation; that no contract or agreement, expressed or implied, has been made for the sale or other disposition of such lands in case I am permitted to purchase the same; and that I know of no prior settler claiming any portion of said land.*

Subscribed and sworn to before me at ..... *this* ..... *day of* ..... *18*.....

APPLICATION

to Purchase Tide Lands.

T. ..... R. .....

..... County.

Filed 188

Book ..... Page .....

Filed 188

..... Clerk of Board.

F-3

SURVEY.

RULES and REQUIREMENTS of the BOARD.

No Tide Lands will be sold which do not front upon lands over which the U. S. Surveys have been extended.

The initial point must be on the meander line and at the corner of some legal subdivision of the U. S. Survey.

The meander line of high-water mark should coincide with the U. S. meander line, unless it is manifestly incorrect, and should continue up to the corner of some legal subdivision of the U. S. Survey.

The lines across tide lands must be E. & W. or W. & N., and must be an extension of the lines of the subdivisions adjacent and must extend to low tide mark.

The meander line of low water mark must be at the line of low water and must include all of the tide land.

Field notes of the survey of the Tide Lands fronting or abutting upon [illegible] *of Section* [illegible] *T.* [illegible] *N.* [illegible] *W. of the Willamette Meridian, Oregon.*

Beginning at a point on the U. S. Meander Line [illegible]

THENCE

Course	Distance	
[illegible]	[illegible]	Along ordinary high-water mark.
West	[illegible]	Along [illegible]
South	[illegible]	Along low tide line
East	[illegible]	Along [illegible]

I, [illegible] County Surveyor of [illegible] County, do hereby certify that on the [illegible] day of [illegible] 1891, at the request of [illegible] I surveyed the Tide Lands lying in front of the [illegible] of Sec. [illegible] Tp. [illegible] R. [illegible] W.; that the foregoing are the true and correct returns of said survey; that all of the lands embraced in said survey are Tide Lands, and that said survey includes all of the Tide Lands in front of said Lot, and contains [illegible] acres, and that from my examination, and from such other information as I have been able to obtain, I believe the general value of said lands to be $[illegible] per acre.

[illegible]

County Surveyor of [illegible] County.

APPLICATION TO PURCHASE.

To the Board of Commissioners for the Sale of School Lands &c., of the State of Oregon:

I hereby apply to purchase the Tide Lands embraced in the foregoing survey, and I herewith tender you the appraised value thereof, to-wit: .....*Dollars.*

This application is made with full knowledge of the character of the land applied for and of the title of the State thereto, and I hereby waive and relinquish all right to and claim upon the State for the return of the purchase price of said lands in case said lands or any part thereof should be found to be not Tide Lands.

.....

STATE OF OREGON,
County of ..... } ss.

I, ... *being first duly sworn say, that I am over 18 years of age; that I* .... *citizen of the United States; that I am a citizen of this State; that I have not directly nor indirectly made any previous purchase of lands from the State, nor has any person for me, which, together with the lands described in the above application, would exceed three hundred and twenty acres. That the above application is made to purchase lands for my own use, and not for purposes of speculation; that no contract or agreement, expressed or implied, has been made for the sale or other disposition of such lands in case I am permitted to purchase the same; and that I know of no prior settler claiming any portion of said land.*

.....

Subscribed and sworn to before me at ..... *this* ..... *day of* ..... *18*.....

.....

.....

APPLICATION

to

Purchase Tide Lands.

E. K. Adams
Tide Land Agt.

..... County.

Deed made ..... 188...

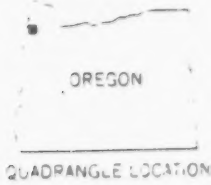
Book ..... Page .....

Filed ..... 188...

..... Clerk of Board.

APPENDIX G

TILLAMOOK HEAD QUADRANGLE
OREGON–CLATSTOP CO.
7.5 MINUTE SERIES (TOPOGRAPHIC)
NW/4 CANNON BEACH 15' QUADRANGLE



CONTOUR INTERVAL 50 FEET
DASHED LINES REPRESENT HALF-INTERVAL CONTOURS
NATIONAL GEODETIC VERTICAL DATUM OF 1929
SHORELINE SHOWN REPRESENTS THE APPROXIMATE LINE OF MEAN HIGH WATER
THE AVERAGE RANGE OF TIDE IS APPROXIMATELY 8 FEET

Mapped by the Army Map Service
Published for civil use by the Geological Survey

Control by USGS, USC&GS, USCE, Oregon Geodetic Survey, State Highway Dept., and Pacific Power and Light Company

Topography from aerial photographs by multiplex methods
Aerial photographs taken 1943. Field check 1949

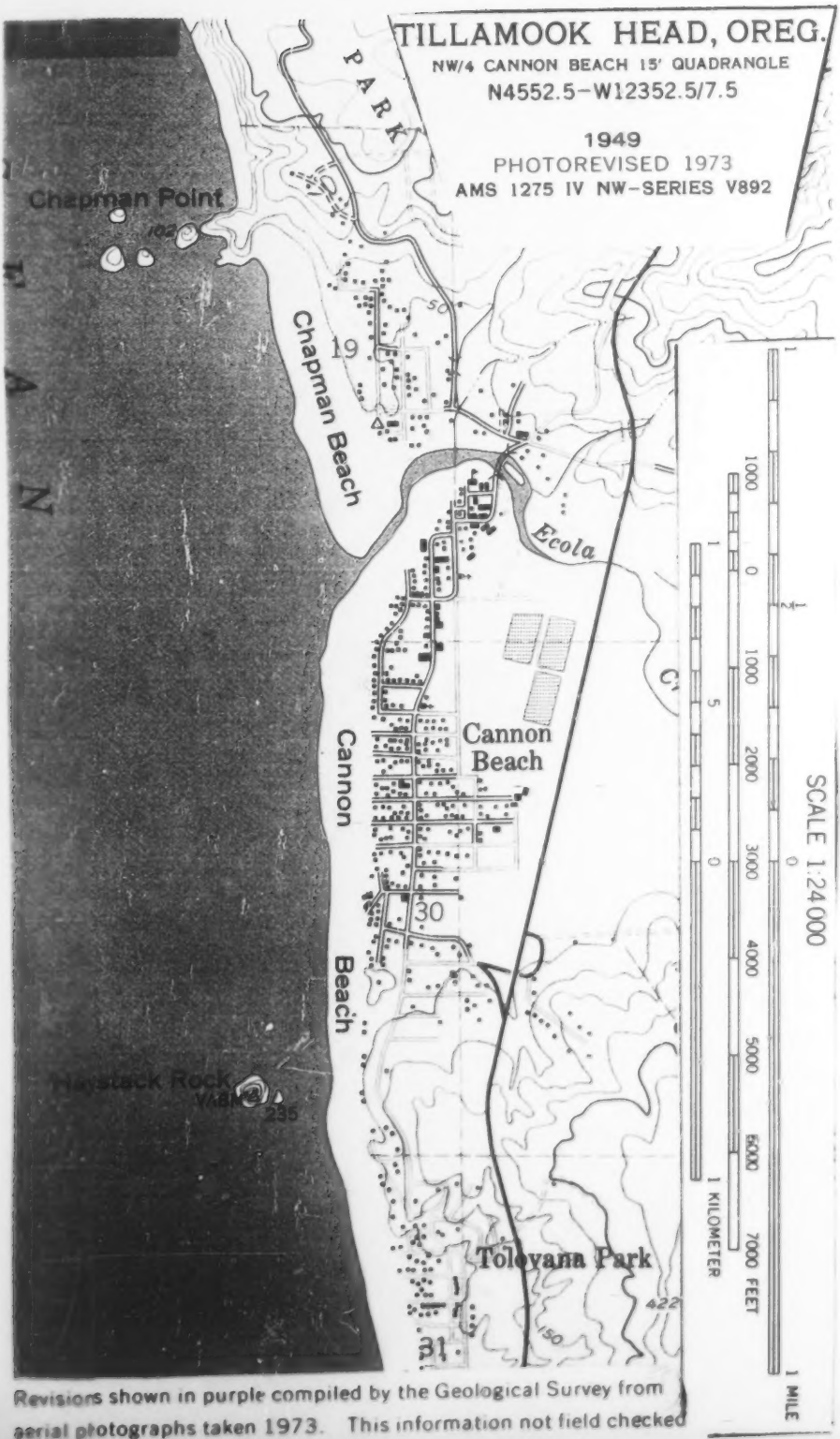
Polyconic projection. 1927 North American datum
10,000-foot grid based on Oregon coordinate system, north zone

Red tint indicates area in which only landmark buildings are shown

Dashed land lines indicate approximate locations

1000-meter Universal Transverse Mercator grid ticks, zone 10, shown in blue

THIS MAP COMPLIES WITH NATIONAL MAP ACCURACY STANDARDS
FOR SALE BY U.S. GEOLOGICAL SURVEY, DENVER, COLORADO 80225, OR RESTON, VIRGINIA 22092
A FOLDER DESCRIBING TOPOGRAPHIC MAPS AND SYMBOLS IS AVAILABLE ON REQUEST



Revisions shown in purple compiled by the Geological Survey from aerial photographs taken 1973. This information not field checked

94-465

No. 94-___

OCT 6 1994
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

IRVING C. AND JEANETTE E. STEVENS,
Petitioners,

v.

PETER W. STOTT, L. John Harrington, James F. Wells, Kathryn E. Kendall, Josephine W. Hatfield, Walter T. Williamson, III, Judith A. Garling, William A. Jack and Evelyn J. Jack, as Trustees of the William A. Jack Family Trust, Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr., and Jocelyn U. Groom, as Trustee of the Separate property Trust of Jocelyn U. Groom,
Respondents.

On Writ of Certiorari To The
Oregon Court of Appeals
Of The State of Oregon

RESPONDENTS' BRIEF OPPOSING CERTIORARI

Jacob Tanzer of Ball, Janik & Novack
Counsel of Record
101 S.W. Main Street,
Suite 1100
Portland, Oregon 97204
(503) 228-2525 Attorneys for Respondents

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

The questions stated by Petitioners are not presented for review. This is discussed below.

LIST OF PARTIES

Accepted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

RESPONSE TO REASONS FOR GRANTING THE WRIT 4

Summary 4

Discussion 4

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Shively v. Bowlby, 152 US 1, 14 7

State ex rel v. Thornton v. Hay, 254 Or 584, 462 P2d 671 (1969) 10

Stevens v. City of Cannon Beach, 114 Or App 457, 835 P2d (1991), 317 Or 131, 854 P2d 449 (1993) cert den __ US ____, 114 S Ct 1332, 127 LEd2d 679 9

Statutes

11 Stat 383 (1859) 2

28 USC Section 1257(a) 1

Oregon Revised Statutes 19.125(3) 5

Constitutional Provisions

Fourteenth Amendment of the United States Constitution 2

RESPONDENTS' BRIEF OPPOSING CERTIORARI

OPINIONS BELOW

Accepted.

STATEMENT OF JURISDICTION

Respondents do not accept Petitioners' Statement of Jurisdiction. They have not demonstrated any way in which 28 USC Section 1257(a), under which they claim, is implicated by the decision below. The validity of no treaty or statute of the United States has been questioned. No state statute has been questioned under federal law. No right, privilege or immunity has been claimed under the laws of the United States. The issue decided by the Oregon Court of Appeals was how to construe a plat map. 28 USC Section 1257(a) does not apply.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents do not accept Petitioners' statement of Constitutional Provisions and Statutes Involved.

No issue is presented involving the Fourteenth Amendment of the United States Constitution. Petitioners have not alleged and do not assert that the state has taken anything from them. The only state action in this case is the adjudication of private ownership rights between private individuals.

No violation of the Oregon Admission Act, 11 Stat 383 (1859) is alleged or asserted. Petitioners do not claim that the State of Oregon interfered with the primary disposal of the soil within Oregon by the United States or with any congressional act for securing title in said soil to anybody. It is undisputed that the United States disposed of this soil by patent in about 1889.

Respondents have failed to demonstrate any way in

which the Oregon legislature's acceptance of the federal offer of statehood in 1859 is involved.

Petitioners have not shown that any of these provisions were pleaded or relied upon in the state court.

STATEMENT OF THE CASE

Accepted, except for the following:

1. We accept the first sentence describing the Respondents' Complaint, but do not accept the characterization in the second sentence of respondents' argument. It was Respondents' position throughout this case that the Petitioners owned nothing.

2. We do not accept the inclusion of or the reference to Appendix G. Neither Appendix F nor Appendix G to the petition appear in the record of this case. The purpose of appending the exhibits is unclear from the petition, but we wish to avoid any misunderstanding based upon these documents.

3. We do not accept Petitioners' characterization of

the holding of the Oregon Court of Appeals. It speaks for itself.

RESPONSE TO REASONS FOR GRANTING THE WRIT

Summary

The federal question asserted by petitioners is not presented by this case. The dispositive issue is a garden variety state law interpretation of a 1910 plat map, applying rules of construction derived from Oregon caselaw to the specific evidence in this record.

Discussion

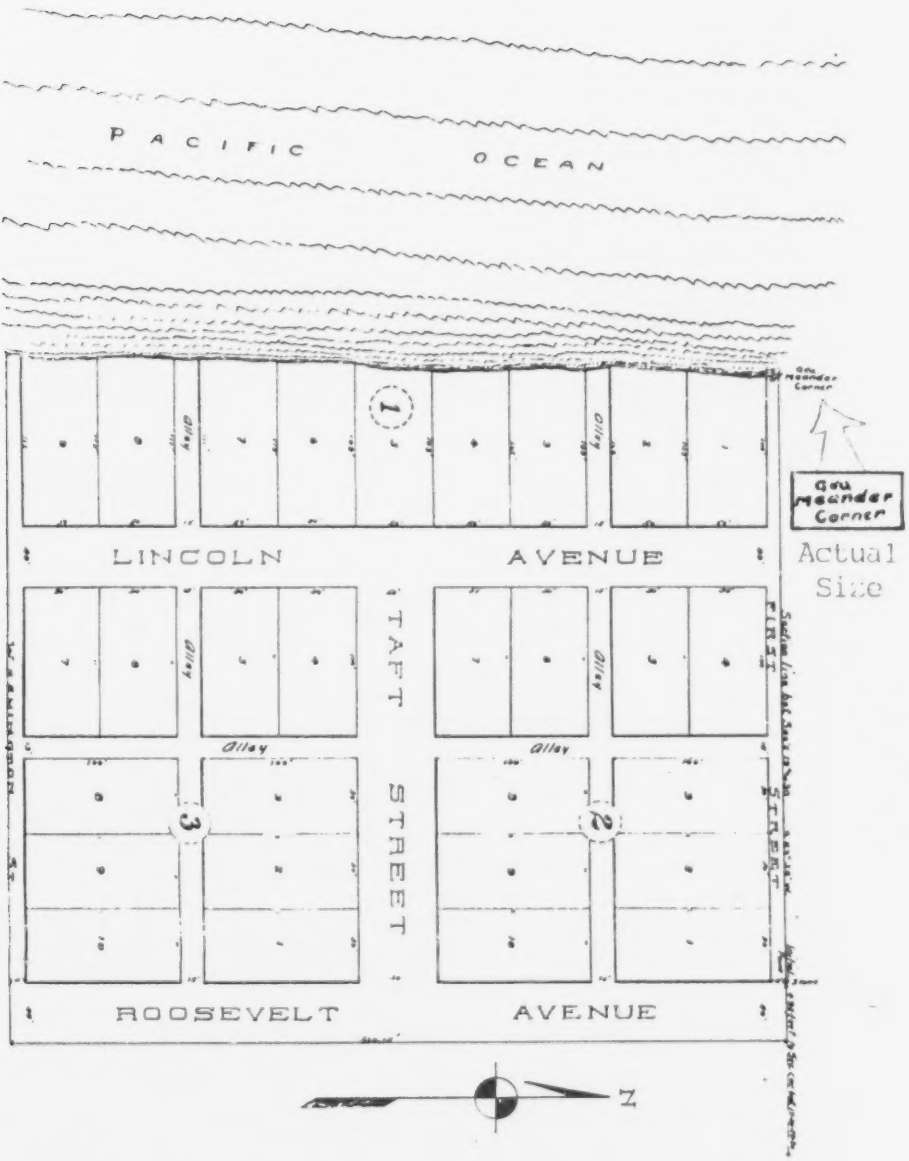
Petitioners strain unsuccessfully to find a federal question upon which to base their pursuit of certiorari. The only question before the Oregon courts, however, was a factual issue of whether the plat map reproduced below was intended to grant to the ocean or, as petitioners contended, that the original grantors intended to reserve a strip between the lots and the ocean. The Oregon Court of

Appeals, applying rules of construction derived from Oregon caselaw to the specific evidence of the case, found as a matter of fact, not law, de novo on appeal[1] that the original grantors intended to grant to the ocean.

---

[1]Oregon grants its appellate courts authority to decide facts anew on the record in equity cases. This appeal was governed by Oregon Revised Statutes 19.125(3) which provides:

> "Upon an appeal from a decree in a suit in equity, the Court of Appeals shall try the cause anew upon the record."



(Detail from Exhibit 2)

This factual finding not only involves no federal question, it involves no doctrinal question.

It is true that the Court of Appeals stated that in 1910, oceanside owners claiming from federal grants believed they owned to the high water mark. This factual assumption was consistent with, if not invited by, the Petitioners' statement in their trial brief that:

> "Prior to 1935, title to property abutting the Pacific Ocean ran to the high water mark. Shively v. Bowlby, 152 US 1, 14." (Defendants' Trial Brief, page 3; original emphasis)

Now, seeking certiorari and still citing Shively v. Bowlby, Petitioners argue that the lower court erred in assuming that owners in 1910 believed their ownership extended to the high water mark. Having asserted that very proposition to the trial court, petitioners should not be heard now to assert the contrary proposition.

The challenged statement is tangential. The critical fact in the case is the appearance of the government

meander corner in the plat map. The dispositive reasoning of the court is based on the existence of that meander corner:

> "A meander line in a description indicates that the water itself is the true boundary. *Seabrook v. Coos Bay Ice Co.* 49 Or 237, 89 P 417 (1907). Therefore, a grant to the meander line is presumed to be a grant to the water. *Morse Bros., Inc. v. Wallace*, 78 Or App 138, 140 2, 714 P2d 1095, rev den 301 Or 165 (1986). Moreover, even if a description in a plat is ambiguous, there is a policy against construing conveyances so as to create strips of land, the title to which would remain in abeyance for lengthy periods. *Nelson v. Vandemarr*, 281 Or 65, 68, 573 P2d 1232 (1978).
>
> "We apply those rules to the evidence in this case." See opinion at Petition for Certiorari A-7.

Thus, the dispositive fact in this case is that the plat map says "GOV MEANDER CORNER" at the northwest corner of the plat[2] and the Oregon court made findings based on

---

[2] The term is hard to read in this reduced reproduction, but the original is more legible and all pertinent testimony and judicial reasoning was based on this reading of the notation. We do not believe this to be a disputed point.

that fact which displease Petitioners. Because this is not even arguably a federal issue, Petitioners have ignored it, choosing instead to rely upon a passing observation, not essential to the decision, to satisfy the certiorari requirement of a federal question. In truth, however, Petitioners' asserted issue was not a premise of the lower court decision. Indeed, it is *obiter dictum*. It is doubtful that this case presents it for review.

Petitioners' search for significance beyond this case is attenuated, to say the least. They attack collaterally two earlier Oregon decisions with which they express great dissatisfaction, and imply that certiorari in this case would straighten out the prior cases. They come to this concern a little late. Certiorari was denied in one of the prior cases[3]

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[3] Stevens v. City of Cannon Beach, 114 Or App 457, 835 P2d (1991), 317 Or 131, 854 P2d 449 (1993) cert den __ US ____, 114 S Ct 1332, 127 LEd2d 679.

and not sought in the other.[4]

Petitioners give no reason why certiorari is more warranted in this collateral attack than it was at the time the disliked cases were decided.

Petitioners also argue that this court should review this case because they fear that the statement regarding pre-1935 ownership might someday be used as a premise by other courts. Petitioners' concern that courts of other seaboard states will make decisions similar to Oregon's earlier cases is not only premature, but they probably

---

[4] State ex rel v. Thornton v. Hay, 254 Or 584, 462 P2d 671 (1969) (public has a right to use dry sand area under common law doctrine of custom). In this decision, the Oregon Supreme Court expressly disclaimed reliance upon the difference between the extreme high-tide line and the high water mark, ruling only as to the land between the water and the vegetation line under Oregon law.

Petitioner's complaint that this decision under Oregon real property law constitutes a "windfall to the State of Oregon," Petition 15, sounds hollow. The record shows that Petitioners sought out descendants of the ancient platters, including the Beckers, and purchased quitclaim deeds for token payments. They now claim to own a sizable portion of the northern Oregon coast. Apparently, they prefer that the windfall, if any, belong to them rather than to the public.

overestimate the precedential heft of this state law factual decision from the Oregon Court of Appeals. All in good time. If and when another court relies on the same assumption as a dispositive matter of law, the aggrieved litigants of that case can seek certiorari in the context of its specific record and rulings and this court can assess the issue on the merits of the case in which it is presented. It seems much more likely, however, that state courts will decide their quiet title cases based on state law real property grounds, just as the Oregon courts did.

CONCLUSION

Petitioners seek review of a nondispositive statement of fact which they themselves asserted in the trial court, in a factual case decided under state law. There is

no basis for certiorari. The petition should be denied.

DATED October 3, 1994.

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No. 94-465

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

IRVING C. AND JEANETTE E. STEVENS,
Petitioners,

v.

PETER W. STOTT, L. John Harrington, James F. Wells, Kathryn E. Kendall, Josephine W. Hatfield, Walter T. Williamson, III, Judith A. Garling, William A. Jack and Evelyn J. Jack, as Trustees of the William A. Jack Family Trust, Susan U. Rick, John M. Ulrich, Warren J. Ulrich, Jr., and Jocelyn U. Groom, as Trustee of the Separate property Trust of Jocelyn U. Groom,
Respondents.

On Writ of Certiorari To the
Oregon Court Of Appeals
Of The State of Oregon

PETITIONERS' REPLY MEMORANDUM TO RESPONDENTS' BRIEF IN OPPOSITION

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11pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ..... ii, iii

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

THE INCORRECT STATEMENT
OF LAW BY THE COURT BELOW 6

CONCLUSION 6

TABLE OF AUTHORITIES

Cases	Pages
Blundell v. Catterall, 5 Barn & A 268, 292, 106 Eng. Reprint, 1190	5
Borax Ltd. v. Los Angeles, 296 U.S. 56 S. Ct. 23, 80 L.Ed. 9 (1935)	4, 5
In re Ashford, 50 Haw. 314, 440 P2d 76 (1968)	5
Martin v. Waddell, 41 U.S. 16 Pet. 367 (1842)	5
Shively v. Bowlby, 152 U.S. 1 (1894)	5
State ex rel Thorton v. Hay, 254 Or 258 4 589, 462 P2d 671 (1969)	4, 7
Stevens v. City of Cannon Beach 114 Or App 457, 835 P2d 9 40 (1992) 317 Or 131, 854 P2d 449 (1993) cert. den. ___ U.S.___ 114 S. Ct. 1332 (1994)	7

United States v. Pacheco,
2 Wall 587, 590 (1842) 5

Treatises

"Judicial Notice" 55 Colum. L.
Rev. 945 (1955) 2

Davis, *"An Approach to Problems of Evidence in Administrative Process,* 55 Harv. L. Rev.
364, 404-407 (1942) 2

"A System of Judicial Notice Based On Fairness and Convenience"
Prospective of Law 69 (1964) 2

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Pursuant to Supreme Court Rule 15.6, Petitioners Irving C. and Jeanette E. Stevens respectfully submit this

Reply Memorandum to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Respondent's have objected to the inclusion of Appendix F (State of Oregon form for Application and Survey of Tidelands to be deeded by the State to private owners) and Appendix G (U.S. Geological Survey Map of Cannon Beach Quadrangle).

The submission of Appendix F is a submission of a "legislative fact", as that term was coined by Professor Kenneth Davis in *"An Approach to Problems of Evidence in Administrative Process"* 55 Harv. L. Rev. 364, 404-407 (1942) and further discussed in *"Judicial Notice"* 55 Colum. L. Rev. 945 (1955) and in *"A System of Judicial Notice Based On Fairness and Convenience"* in Prospective of Law, 69 (1964). The Appendix was not submitted as an adjudicative fact, as the State form did not involve, in any way, the parties herein. The form is merely reflective of the policy of the State of Oregon relating to its placement of the boundary

between tidelands and the dry sand portion of Oregon's beaches at the ordinary high-water mark between the period of 1859 and 1935, contrary to the Court's ruling that the boundary was the upland's vegetation line.

Similarly, Appendix G (The Coast and Geodetic Survey of Cannon Beach) is a legislative fact and is only offered to illustrate the beach property in question, for whatever assistance it may give the Court.

REASONS FOR GRANTING THE WRIT

The declaration of law by the court below, that prior to 1935, Oregon's beaches' high water line, —— assumed to be the vegetation line —— was the boundary between the state owned property and the upland property was not *obiter dictum,* as argued by Respondent on page 9 in its Brief in Opposition.

The lower court's exact holding was:

> "The high-water line is significant, because, in 1910, landowners claiming under federal patents owned seaward only to the high water

> line, which is assumed to be the vegetation line. In 1935, the Supreme Court held that a federal patent conveyed title to land farther seaward, to the mean high-tide line. *State ex rel Thorton v. Hay,* 254 Or 258 4 589, 462 P2d 671 (1969); *See Borax Ltd. v. Los Angeles,* 296 U.S. 56 S Ct 23, 80 L.Ed. 9 (1935). . ." at A-4 (emphasis added)

The above statement of law elevated identical *obiter dictum* in *State ex rel Thorton v. Hay, supra,* to the law of the state, with an impact upon present and future beachfront owners as is set forth in petitioners' opening brief.

The statement of law regarding the boundary between public and private land on Oregon beaches is in direct conflict with the Supreme Court's consistent holdings on that boundary, as well as being directly contrary to Oregon's unbroken line of cases that the boundary between the state and private ownership on Oregon's beaches was the ordinary high tide land from the state's inception.

The Respondents are mistaken in contending that the lower court's ruling was consistent with or invited by

Petitioners' statement in their trial brief that:

> "Prior to 1935, title to property abutting the Pacific Ocean ran to the *high water mark Shively v. Bowlby,* 152 US 1 (1894) '. . . [By] the common law, the shore is confined to the flux and reflux of the sea at ordinary tides. *Blundell v. Catterall,* 5 Barn & A 268, 292, 106 Eng. Reprint, 1190. It is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow'".
> *Borax Consolidated Ltd. v. Los Angeles,* 296 US 10, 22-23 (1935).

"High-water mark" has never referred to the vegetation line in american jurisprudence except in the State of Hawaii. *See: In re Ashford,* 50 Haw. 314, 440 P2d 76 (1968). The conflict with the Supreme Court's unbroken definition of the littoral boundary, since 1842 and *Martin v. Waddell,* 41 U.S. 16 Pet. 367 (1842), arises by the Court of Appeals placing the boundary at the vegetation line rather than at the high-water mark which is synonymous with the ordinary high tide line. *United States v. Pacheco,* 2 Wall 587, 590 (1842). That error was not invited by Petitioner.

THE INCORRECT STATEMENT OF LAW BY THE COURT BELOW

The lower court has eradicated private ownership of Oregon's beaches from the State's admission date (1859) until 1935, thereby creating a fictitious foundation for the Oregon high court's creation of recreational easement on private beach property under the English common law doctrine of ancient custom. The petition should be granted.

CONCLUSION

Finally, the change in Oregon's law was used by the lower court to deprive Petitioners of their real property, without due process of law. Further, the decision will do the same to thousands of other beach front property owners similarly situated in Oregon as already accomplished in

State ex rel Thornton v. Hay, supra, and *Stevens v. City of Cannon Beach,* 114 Or App 457, 835 P2d 9 40 (1992), 317 Or 131, 854 P2d 449 (1993) cert. den. __ U.S. ___ 114 S. Ct. 1332 (1994).

Dated October 21, 1994.

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